STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9262
	)	
RICHARD ALLEN,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on May 10, 2011, by telephone and webcast at sites in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Mark A. Emanuele, Esquire
Panza, Maurer and Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

For Respondent: Jeffrey S. Sirmons, Esquire
Johnson and Sirmons
510 Vonderburg Drive, Suite 309
Brandon, Florida 33511

STATEMENT OF THE ISSUE

Whether there exists just cause to suspend Respondent from his teaching position for five days, without pay, for "misconduct in office" and "immorality," as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

On August 10, 2010, the Broward County Superintendent of Schools issued an Administrative Complaint recommending that the Broward County School Board (School Board) suspend Respondent from his position as a teacher for five days, without pay, based on the following "[a]dministrative [c]harges":

> 6. Respondent, Richard Allen, informed students in his American History class toward the beginning of the 2009-2010 school year that he would be purchasing a subscription for a magazine that would be used by the students in the class for class projects. Respondent informed the students in the class that the magazine subscription would cost each student three dollars ($3.00), which students were to provide to Respondent. Respondent thereafter began personally collecting three dollars ($3.00) from each student and keeping a record of those students who had paid and those who had not.
>
> 7. Respondent did not obtain approval from the principal's designee prior to collecting and/or distributing moneys from the students, nor had he discussed or planned the collection or distribution of the students' moneys with the principal's designee, as is required by school policy. A copy of the school's policy regarding collection of money by teachers is attached

> hereto as Exhibit A and incorporated by reference herein.
>
> 8. Respondent also did not inform the bookkeeper of the moneys collected, nor did he deposit the moneys with the bookkeeper daily, as is required pursuant to the school policy attached hereto as Exhibit A.
>
> 9. In all, Respondent collected three dollars ($3.00) from approximately 75 students, totaling approximately two hundred and twenty-five dollars ($225.00) toward the purchase of the magazine subscription.
>
> 10. Despite personally collecting these moneys from his students, Respondent never provided to his students the magazine for which they had paid, nor did Respondent return the collected moneys to said students.

According to the Administrative Complaint, Respondent's conduct, as described in these "administrative charges," amounted to "misconduct in office" and "immorality," in violation of section 1012.33, Florida Statutes, and Florida Administrative Code Rules 6B-1.001, 6B-1.006, and 6B-4.009, thus giving the School Board just cause to take the recommended disciplinary action against him.

Inasmuch as Respondent had requested a chapter "120 hearing [on] the validity of the [recommended] suspension," the matter was referred to DOAH. The referral was made on September 22, 2010.

As noted above, the final hearing in the instant case was held on May 10, 2011.[2] Nine witnesses testified at the hearing:

J. D., S. G., Patrick Lowe, Robert Godwin, Sharon Grant, Enid Valdez, Respondent, C. C., and Richard Mijon. In addition to the testimony of these nine witnesses, the following exhibits were offered and received into evidence at hearing: Petitioner's Exhibits 1 through 7, 10 through 16, and 18 through 23, and Respondent's Exhibit 1. Following the hearing, on June 21, 2011, the record was reopened to receive an additional exhibit, Respondent's Exhibit 4 (consisting of Article 18 of the collective bargaining agreement between the School Board and Respondent's collective bargaining representative, the Broward Teacher's Union, in effect during the 2009-2010 school year).

At the conclusion of the hearing on May 10, 2011, the undersigned announced on the record that the parties would have 30 days from the date of the filing of the hearing transcript with DOAH to file their proposed recommended orders.

The hearing Transcript (consisting of two volumes) was filed with DOAH on June 6, 2011.

On July 1, 2011, Respondent filed an unopposed motion requesting that the deadline for the filing of proposed recommended orders be extended to July 20, 2011. The motion was granted by Order issued July 5, 2011.

Respondent and Petitioner timely filed their Proposed Recommended Orders on July 20, 2011.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. The School Board is responsible for the operation, control, and supervision of all public schools (grades K through 12) in Broward County, Florida (including, among others, Piper High School (Piper)), and for otherwise providing public instruction to school-aged children in the county.

2. At all times material to the instant case, Enid Valdez was the principal of Piper; Patrick Lowe, Robert Godwin, and Sharon Grant were assistant principals at the school; and Donavan Collins was the school's social studies department chair.

3. Respondent has been a social studies teacher at Piper since 2002. He presently holds a professional services contract with the School Board.

4. During the first semester of the 2009-2010 school year, Respondent taught three American History classes at Piper (during the first, second, and fourth periods of the school day).

5. The previous school year, in or around February 2009, Respondent had ordered, in his own name, a 25-copy per issue subscription for the upcoming 2009-2010 school year to "New York Times Upfront" (Upfront), a magazine for high school students

published by Scholastic, Inc., that Respondent believed to be an "excellent [learning] tool" from which his students could benefit academically. The total cost of the subscription (Upfront Subscription) was $246.13. Respondent planned to use the magazine in the classes he would be teaching at Piper the following school year.

6. After receiving, in or around August 2009, 25 copies of the September 2009 issue of Upfront, the first issue of the 2009-2010 school year, Respondent distributed them to the students in his three American History classes for their review. He told the students they each would have the option of using Upfront, instead of School Board-provided materials, for class assignments, provided they paid him $3.00 to help cover the cost of the Upfront Subscription. He subsequently asked each student in his three classes whether or not that student wanted to exercise this option and noted on the class roster those students who responded in the affirmative (Upfront Option Students). For the next two or so months, he collected money (in cash) from the Upfront Option Students and recorded each payment he received.

7. On October 22, 2009, using his debit card, Respondent made an initial payment to Scholastic of $124.00 for the Upfront Subscription (that he had ordered in or around February 2009).

He made a second and final payment of $122.13 (again using his debit card) on November 3, 2009.

8. The money Respondent collected from the Upfront Option Students was insufficient to cover the $244.13 cost of the Upfront Subscription. Respondent paid the shortfall out of his own pocket.

9. Sometime in early November 2009, Respondent gave the Upfront Option Students their first assignment from the magazine (copies of which Respondent had distributed to the students).

10. During the 2009-2010 school year, Piper had the following policy concerning the collection of money (Piper Collection of Money Policy), which was published in the Piper 2009-2010 Faculty Handbook:

> Money is never to be left in any classroom, storage cabinet, or office desk. Collected money is the responsibility of the teacher and is deposited with the school bookkeeper by the end of the day. A receipt will be given when the money is deposited.
>
> Money cannot be collected by any teacher unless the collection and distribution of the money has been previously discussed, planned, and approved by the principal's designee and the bookkeeper has been informed. All money must be deposited daily with the bookkeeper.

(The document referred to in paragraphs 7 and 8 of the Administrative Complaint as "Exhibit A" is a copy of the Piper

Collection of Money Policy, as the parties stipulated at hearing.[3] See pp. 66 and 67 of the hearing transcript.)

11. Respondent was provided a copy of the Piper 2009-2010 Faculty Handbook prior to the beginning of the 2009-2010 school year.

12. At all times material to the instant case, Respondent was aware of the Piper Collection of Money Policy. Nonetheless, in violation of that policy, he did not obtain, or even seek, the necessary administrative approval to collect money from the Upfront Option Students, nor did he deposit any of the money he collected from these students with the bookkeeper, much less inform her (or any school administrator, for that matter) of his money collection activities. The foregoing notwithstanding, his intent in acting as the conduit through which these students purchased issues of Upfront for use in his classes was to help the students achieve academic success, not to exploit them for his own personal gain or advantage. He never had any intention of doing anything with the money he collected from the students other than using it (as he ultimately did) to help cover the cost of the Upfront Subscription.

13. It was not until on or about October 19, 2009, that the Piper administration first learned about Respondent's money collection activities as a result of discussions that Assistant Principal Lowe had with students in Respondent's classes. After

having been briefed by Mr. Lowe regarding what these students had reported, Principal Valdez asked Assistant Principal Grant to speak with Respondent. During his meeting with Ms. Grant, Respondent admitted to collecting money from the Upfront Option Students to help pay for the Upfront Subscription, and he acknowledged that he had not sought approval from anyone in the school administration to do so.

14. On or about October 26, 2009, Principal Valdez sent a Personnel Investigation Request to the School Board's Office of Professional Standards and Special Investigative Unit (SIU) through which she requested that SIU conduct an investigation of the matter.

15. An investigation was authorized by SIU on October 28, 2009, and an SIU investigator was assigned the case a week later.

16. On or about November 3, 2009, Respondent was provided with a letter from Craig Kowalski, the SIU Acting Executive Director, advising Respondent of SIU's "investigation into a complaint . . . regarding an alleged violation [by Respondent] of the Principles of Professional Conduct of the Education Profession in Florida, Rule 6B-1.006(2)(h) [sic],[4] to include the collection of money from students to purchase magazines."

17. After the SIU investigation was completed, an investigative report was prepared and presented to the School Board's Professional Services Committee for its consideration.

18. The Professional Services Committee found "probable cause." A pre-disciplinary conference was then held, after which the Superintendent, on August 10, 2010, issued an Administrative Complaint recommending Respondent's suspension, without pay, "for a period of five (5) days effective from June 3, 2010 through June 9, 2010."

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to chapter 120.

20. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2).

21. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.23(1).

22. A district school board is deemed to be the "public employer," as that term is used in chapter 447, Part II, "with respect to all employees of the school district." § 447.203(2).

As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons," provided it exercises these powers in a manner that is consistent with the requirements of law. § 447.209.

23. At all times material to the instant case, district school boards have had the right, under section 1012.33(6)(a), to suspend or dismiss, for "just cause," classroom teachers and other instructional personnel[5] having professional service contracts.

24. At all times material to the instant case, "just cause," as used section 1012.33, has been legislatively defined (in subsection (1)(a) of the statute) to include, "but . . . not [be] limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude." The "but . . . not limited to" language makes abundantly clear that the list of things constituting "just cause" was intended by the Legislature to be non-exclusive and that other wrongdoing may also constitute "just cause" for suspension or dismissal, provided such wrongdoing is at least of the same seriousness or magnitude as those misdeeds specifically

mentioned in the statute. See Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994)(Blue, J., specially concurring)("We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins [set forth in section 231.36(1)(a), Florida Statutes (2001), the predecessor of section 1012.33(1)(a)] constituting just cause,[6] would also be grounds for dismissal. . . . In amending section 231.36 and creating a new contract status for teachers (professional service) and by failing to further define just cause, the legislature gave school boards broad discretion to determine when a teacher may be dismissed during the contract term. . . . I agree with the majority--that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'"); and Miami-Dade Cnty. Sch. Bd. v. Singleton, Case No. 07-0559, 2006 Fla. Div. Adm. Hear. LEXIS 614 *51 (Fla. DOAH Oct. 26, 2006; Miami-Dade Cnty. Sch. Bd. Aug. 10, 2007)("Neither offense is specifically mentioned in [s]ection 1012.33(1)(a), Florida Statutes, as an example of 'just cause,' although the statutory list of such instances, as we have seen, is not intended to be exclusive. Yet, the doctrine of ejusdem generis, . . . requires that for 'just cause' to be found based upon an unexemplary instance, the unexemplary instance must bear a close affinity to one of the exemplary instances."); see also Pro-Art Dental Lab,

Inc. v. V-Strategic Grp., LLC, 986 So. 2d 1244, 1257 (Fla. 2008) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); and Peninsular Indus. Ins. Co. v. State, 61 Fla. 376, 380-381 (Fla. 1911)("From these statutory provisions it is clear that the obligation to pay the two per cent tax upon gross receipts is placed upon 'each insurance company, or association, firm or individual doing business in this State, including' some that are specially enumerated; but such enumeration manifestly is not complete for the less extensive word 'including' is used merely as illustrative and not exclusive.").

25. "Immorality" has been defined "by rule of the State Board of Education" (specifically Florida Administrative Code Rule 6B-4.009(2)[7]) as follows:

> Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

26. "Misconduct in office" has been defined "by rule of the State Board of Education" (specifically Florida Administrative Code Rule 6B-4.009(3)) as follows:

> Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of

> Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

27. The Code of Ethics of the Education Profession (as set forth in Florida Administrative Code Rule 6B-1.001) provides as follows:

> (1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.
>
> (2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.
>
> (3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

28. Florida Administrative Code Rule 6B-1.006, which contains the Principles of Professional Conduct for the Education Profession in Florida, provides as follows:

> (1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.

(c) Shall not unreasonably deny a student access to diverse points of view.

(d) Shall not intentionally suppress or distort subject matter relevant to a student's academic program.

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

(h) Shall not exploit a relationship with a student for personal gain or advantage.

(i) Shall keep in confidence personally identifiable information obtained in the

course of professional service, unless disclosure serves professional purposes or is required by law.

(4) Obligation to the public requires that the individual:

(a) Shall take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.

(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

(c) Shall not use institutional privileges for personal gain or advantage.

(d) Shall accept no gratuity, gift, or favor that might influence professional judgment.

(e) Shall offer no gratuity, gift, or favor to obtain special advantages.

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

(b) Shall not on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition if otherwise qualified, or social and family background deny to a colleague professional benefits or advantages or participation in any professional organization.

(c) Shall not interfere with a colleague's exercise of political or civil rights and responsibilities.

(d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

(e) Shall not make malicious or intentionally false statements about a colleague.

(f) Shall not use coercive means or promise special treatment to influence professional judgments of colleagues.

(g) Shall not misrepresent one's own professional qualifications.

(h) Shall not submit fraudulent information on any document in connection with professional activities.

(i) Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.

(j) Shall not withhold information regarding a position from an applicant or misrepresent an assignment or conditions of employment.

(k) Shall provide upon the request of the certificated individual a written statement of specific reason for recommendations that lead to the denial of increments, significant changes in employment, or termination of employment.

(l) Shall not assist entry into or continuance in the profession of any person known to be unqualified in accordance with

these Principles of Professional Conduct for the Education Profession in Florida and other applicable Florida Statutes and State Board of Education Rules.

(m) Shall self-report within forty-eight (48) hours to appropriate authorities (as determined by district) any arrests/charges involving the abuse of a child or the sale and/or possession of a controlled substance. Such notice shall not be considered an admission of guilt nor shall such notice be admissible for any purpose in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. In addition, shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program, or entering of a plea of guilty or Nolo Contend[e]re for any criminal offense other than a minor traffic violation within forty-eight (48) hours after the final judgment. When handling sealed and expunged records disclosed under this rule, school districts shall comply with the confidentiality provisions of Sections 943.0585(4)(c) and 943.059(4)(c), Florida Statutes.

(n) Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

(o) Shall seek no reprisal against any individual who has reported any allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

(p) Shall comply with the conditions of an order of the Education Practices Commission imposing probation, imposing a fine, or restricting the authorized scope of practice.

> (q) Shall, as the supervising administrator, cooperate with the Education Practices Commission in monitoring the probation of a subordinate.[8]

29. As was stated in Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758, 2007 Fla. Div. Adm. Hear. LEXIS 122 n. 12 **42-43 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007):

> Rule [6B-4.009(3)] plainly requires that a violation of both the Ethics Code and the Principles of Professional Education be shown, not merely a violation of one or the other. The precepts set forth in the Ethics Code, however, are so general and so obviously aspirational as to be of little practical use in defining normative behavior. It is one thing to say, for example, that teachers must "strive for professional growth." See Fla. Admin. Code R. 6B-1.001(2). It is quite another to define the behavior which constitutes such striving in a way that puts teachers on notice concerning what conduct is forbidden. The Principles of Professional Conduct accomplish the latter goal, enumerating specific "dos" and "don'ts." Thus, it is concluded that that while any violation of one of the Principles would also be a violation of the Code of Ethics, the converse is not true. Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of a broad ideal articulated in the Ethics Code be proved, whereas it is both necessary and sufficient that a violation of a specific rule in the Principles of Professional Conduct be proved. It is the necessary and sufficient condition to which the text refers.

30. Both "immorality" and "misconduct in office" may be established in the absence of "specific" or "independent" evidence of impairment, but only where the conduct engaged in by the teacher is of such a nature that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's service and effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands Cnty. Sch. Bd., 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000); and Summers v. Sch. Bd. of Marion Cnty., 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995).

31. "[U]nder Florida law, a [district] school board's decision to [suspend or] terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."[9] McIntyre v. Seminole Cnty. Sch. Bd., 779 So. 2d 639, 641 (Fla. 5th DCA 2001).

32. Pursuant to section 1012.33(6)(a), the hearing may be conducted, "at the district school board's election," either by the district school board itself or by a DOAH administrative law judge (who, following the hearing, makes a recommendation to the district school board).

33. The teacher must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, or policy] the [district school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring). The teacher may be suspended, without pay, pending the outcome of the proceeding; "but, if the charges are not sustained, the employee shall be immediately reinstated [unless, in the case of a proposed suspension, the employee has already served the full period of the proposed suspension and returned to work], and his or her back salary shall be paid." § 1012.33(6)(a).

34. At the hearing, the burden is on the district school board to prove the allegations contained in the notice. The district school board's proof need only meet the preponderance of the evidence standard. See Cisneros v. Sch. Bd. of Miami-Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008)("As the ALJ properly found, the School Board had the burden of proving the allegations of moral turpitude by a preponderance of the evidence."); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of

proving, by a preponderance of the evidence, each element of the charged offense which may warrant dismissal."); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995)("We agree with the hearing officer that for the School Board to demonstrate just cause for termination, it must prove by a preponderance of the evidence, as required by law, that the allegations of sexual misconduct were true . . . ."); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990)("We . . . find that the hearing officer and the School Board correctly determined that the appropriate standard of proof in dismissal proceedings was a preponderance of the evidence. . . . The instant case does not involve the loss of a license and, therefore, Allen's losses are adequately protected by the preponderance of the evidence standard."); and Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990)("We disagree that the required quantum of proof in a teacher dismissal case is clear and convincing evidence, and hold that the record contains competent and substantial evidence to support both charges by a preponderance of the evidence standard."). This burden "is not satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt." Dep't of HRS v. Career Serv. Comm'n, 289 So. 2d 412, 415 (Fla. 4th DCA 1974).

35. In determining whether the district school board has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegation(s) made in the written notice of charges. Due process prohibits a district school board from disciplining a teacher based on matters not specifically alleged in the notice of charges. See Pilla v. Sch. Bd. of Dade Cnty., 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); and Texton v. Hancock, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); see also Sternberg v. Dep't of Prof'l Reg., 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985)("For the hearing officer and the Board to have then found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process.").

36. In the instant case, the written notice of charges (namely, the Administrative Complaint) alleges that "just cause" exists to suspend Respondent from his teaching position for five days, without pay, for "misconduct in office" and "immorality" based on his having violated the Piper Collection of Money Policy in connection with his collecting and handling of money from students for "the purchase of [a] magazine subscription" (as alleged in paragraphs 7 and 8 of the Administrative Complaint); and based on his having failed to either "provide[] to his students the magazines for which they had paid" or to "return the collected moneys to said students" (as alleged in

paragraph 10 of the Administrative Complaint). At hearing, the School Board proved by a preponderance of the evidence that Respondent violated the Piper Collection of Money Policy in the manner described in paragraphs 7 and 8 of the Administrative Complaint; however, its evidentiary presentation fell short of proving by that same quantum of evidence the more serious allegation made in paragraph 10 of the Administrative Complaint. Indeed, the record evidence affirmatively establishes that Respondent did "provide[] to his students the magazines for which they had paid" and did not misappropriate the money he had collected from them.

37. Establishing that Respondent violated the Piper Collection of Money Policy in the manner described in paragraphs 7 and 8 of the Administrative Complaint was necessary, but not sufficient, by itself, to meet the School Board's burden of proof in this case. See, e.g., Miami-Dade Cnty. Sch. Bd. v. Myers, Case No. 08-4126, 2009 Fla. Div. Adm. Hear. LEXIS 312 *10-11 (Fla. DOAH Mar. 5, 2009; Miami-Dade Cnty. Sch. Bd. Apr. 30, 2009)("Violations of [school or] School Board rules do not, of themselves, [necessarily] constitute just cause to discipline an employee pursuant to [s]ection 1012.33(1)(a) and (6)(a).") To establish the existence of the "just cause" for suspension alleged in the Administrative Complaint, it was incumbent upon the School Board to prove, not only that Respondent committed

this violation of school policy, but also that, in so doing, he engaged in "misconduct in office" and/or "immorality," as those terms are used in section 1012.33 and defined in Florida Administrative Code Rule 6B-4.009.

38. The School Board failed to make such a showing. It cannot be said that Respondent's failure to follow the technical, procedural requirements of the Piper Collection of Money Policy (as alleged in paragraphs 7 and 8 of the Administrative Complaint) was conduct "inconsistent with the standards of public conscience and good morals" and of such notoriety as to "bring [Respondent] or the education profession into public disgrace or disrespect"; that it violated any of the Principles of Professional Conduct for the Education Profession in Florida set forth in Florida Administrative Code Rule 6B-1.006; or that it caused any impairment in Respondent's effectiveness in the school system or the community. No finding, therefore, can be made that this violation of school policy committed by Respondent amounted to either "misconduct in office" or "immorality."

39. In view of the foregoing, the School Board has failed to sustain its charges against Respondent.

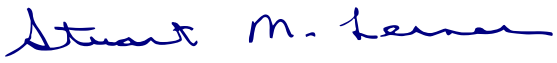
40. Accordingly, these charges must be dismissed, and Respondent must be awarded any "back salary" he is due pursuant to section 1012.33(6)(a).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Broward County School Board issue a final order finding that the charges against Respondent have not been sustained, dismissing these charges, and awarding Respondent any "back salary" he may be owed.

DONE AND ENTERED this 26th day of July, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 2011.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

[2] The hearing was originally scheduled for October 22, 2010, but was continued several times before it was held on May 10, 2011.

[3] There was also a School Board policy in effect which addressed the "Collection of Monies" (School Board Policy 6301), but

neither it, nor any other School Board or Piper policy, aside from the Piper Collection of Money Policy, is referenced in the Administrative Complaint.

[4] There is no Florida Administrative Code Rule 6B-1.006(2)(h), but there is a Florida Administrative Code Rule 6B-1.006(3)(h), which provides as follows:

> Obligation to the student requires that the individual:
>
> Shall not exploit a relationship with a student for personal gain or advantage.

[5] Pursuant to section 1012.01(2), the term "instructional personnel," as used in section 1012.33, includes "classroom teachers."

[6] "Immorality" was added to the "non-exclusive list of sins" in section 1012.33(1)(a) by section 28 of chapter 2008-108, Laws of Florida, effective July 1, 2008.

[7] Florida Administrative Code Rule 6B-4.009 "define[s]" the "basis for charges upon which dismissal action against instructional personnel may be pursued."

[8] The Administrative Complaint does not specify which of these "principles" Respondent allegedly breached. In its Proposed Recommended Order, however, the School Board identifies the "principles" set forth in subsections (3)(a) and (h) and (4)(a) and (c) of the rule as those which it contends Respondent violated.

[9] "A county school board is a state agency falling within [c]hapter 120 for purposes of quasi-judicial administrative orders." Sublett v. Dist. Sch. Bd. of Sumter Cnty., 617 So. 2d 374, 377 (Fla. 5th DCA 1993); see also Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1231 (Fla. 2009)("No one disputes that a school board is an 'agency' as that term is defined in the APA."); Volusia Cnty. Sch. Bd. v. Volusia Homes Builders Ass'n, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006)("[T]he School Board is an agency subject to the Administrative Procedure Act."); and Witgenstein v. Sch. Bd. of Leon Cnty., 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977)("It was obviously the legislative intent to include local school districts within the operation of [c]hapter 120.").

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.